COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Notice of Inquiry Re: Enrollment in Discounted Rates for Electric, Gas and Telephone Service	)	D.T.E. 01-106

INITIAL BRIEF OF NSTAR ELECTRIC AND NSTAR GAS COMPANY REGARDING LEGAL ISSUES ASSOCIATED WITH ELECTRONIC SHARING OF UTILITY CUSTOMER DATA WITH THE EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

I. INTRODUCTION

Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company (collectively, "NSTAR Electric") and NSTAR Gas Company (collectively, with NSTAR Electric, "NSTAR" or the "Company") hereby file an initial brief addressing a question issued by the Department of Telecommunications and Energy (the "Department") in the above-referenced docket.[1] The question issued by the Hearing Officer in this proceeding on June 19, 2003 (the "Briefing Question"), seeks comment on the following issue:

> Please discuss any legal impediment and legal justification for utility participation in a computer matching program with [the Executive Office of Health and Human Services or "EOHHS"] that would involve the electronic transfer of all residential accounts to EOHHS for the sole purpose of identifying customers eligible for discounted service with subsequent destruction of non-matching data.

[1] On December 17, 2001, the Department initiated this proceeding through a Notice of Inquiry opening a generic investigation into certain issues relating to the penetration rate for discount programs that are offered to low-income residential customers by electric, gas and telephone utilities operating in the Commonwealth. Several participants, including NSTAR, filed Initial Comments on January 24, 2002 (NSTAR January 24 Comments). NSTAR also filed comments in this proceeding on November 14, 2002 in response to a Request for Comments issued by the Department on October 31, 2002 (NSTAR November 14 Comments).

Discount Program Penetration Rate, D.T.E. 01-106 (June 19, 2003 Hearing Officer Memorandum at 1).

The Company supports the Department's efforts to find the most effective means of identifying eligible customers for low-income discounts. As has been established previously in comments by NSTAR, the Company has a comprehensive and successful outreach program in place designed to meet the Act's and the Department's goals of providing the greatest possible number of eligible customers with information regarding the Company's low-income discount rate. To that end, the Department's proposed policy appears to be rooted in a provision in the Electric Restructuring Act of 1997 (the "Act") (G.L. c. 164, § 1F(4)(i)) that addresses the implementation of a computer matching program to identify customers that may be eligible for low-income discount rates.[2] The Department properly is seeking input on legal issues that are implicated by this provision.

In short, G.L. c. 164, § 1F(4)(i) authorizes "distribution companies," as defined in G.L. c. 164, § 1, to implement a computer-matching program of some type as a tool to identify customers eligible for low-income discounts.[3] The Act's authorization in G.L. c. 164, § 1F(4)(i) must be read in harmony with other state and federal laws that are

[2] Specifically, G.L. c. 164, § 1F(4)(i), states, in relevant part, that: "[e]ach distribution company shall conduct substantial outreach efforts to make said low-income discount available to eligible customers and shall report to said division, at least annually, as to its outreach activities and results. Outreach may include establishing an automated program of matching customer accounts with lists of recipients of said means-tested public benefit programs and based on the results of said matching program, to presumptively offer a low-income discount rate to eligible customers so identified; provided, however, that the distribution company, within 60 days of said presumptive enrollment, informs any such low-income customer of said presumptive enrollment and all rights and obligations of a customer under said program, including the right to withdraw from said program without penalty."

[3] Accordingly, the Act's authorization in this section is limited to electric distribution companies, and therefore, this section does not authorize the Department to apply the provision broadly to apply to all companies regulated by the Department.

necessarily implicated in the context of implementing a program that involves the sharing of confidential customer information with a governmental agency, as envisioned by the Department in its Briefing Question. Accordingly, as discussed infra, federal and state precedent governing an individual's right to protect certain personal data from public disclosure must be considered by the Department in formulating a policy vis-à-vis sharing customer data. In addition, to the extent that the Department seeks to direct electric, gas and telephone companies (the "Utilities") to participate in a program involving the electronic sharing of customer data with EOHHS, the Department should also include in any order that includes such a directive an explicit mechanism for the Utilities to adjust their distribution rates, after Department review and approval, to allow the Utilities to recover all costs associated with increasing enrollment on the Utilities' respective low-income discount rates.

II. LEGAL ANALYSIS

A. The Department Should Consider Federal And State Precedent Governing an Individual's Right to Protect Certain Personal Data From Public Disclosure in Formulating a Policy Regarding the Sharing of Customer Data With a Governmental Agency.

The Department's proposal to require each Utility to share all "residential accounts" with EOHHS raises several legal issues that relate to an individual's right to protect personal data from public disclosure. As proposed by the Department at a meeting held on April 29, 2003, and restated in the June 19 Memorandum, the Department proposes a two-step process to identify a Utility customer that may be eligible for the Utilities' low-income discount rates via such customer's enrollment on an income-eligible governmental program under the jurisdiction of EOHHS. First, a Utility would periodically send to EOHHS certain, unspecified, residential account data for each

of the Utility's residential customers via electronic means. Then, after EOHHS receives the data, EOHHS would attempt to match the data with its "MassCARES" database[4] to determine if a Utility residential customer is enrolled on an EOHHS-administered program (e.g., transitional assistance or federal and state health benefits), that would qualify such customer for the Utility's low-income discount rate, based on the customer's income eligibility for the EOHHS-administered program. Each of these steps in the proposed data matching process raises privacy issues that should be considered by the Department.

1. The Utilities' Residential Customers That Have Not Applied for Low-Income Discount Rates Have Not Provided Any Authority to the Utilities to Share Their Customer Data with EOHHS.

With respect to the Utilities sharing all of their residential customer data with EOHHS, the Department must consider: (1) federal and state privacy statutes governing an individual's right to privacy and the protection of certain sensitive data; and (2) the Massachusetts Public Records Law, as reflected in G.L. c. 4, § 7 (clause 26)) and G.L. c. 66. Although precedent relating to these statutes does not speak directly to the issue of the sharing of data between a Utility and a governmental agency, such precedent is relevant to an analysis of whether a customer's data may be shared with a governmental agency, without explicit authority from the customer.

a. The Right-of-Privacy Act May Be Implicated if the Utilities Are Required to Share Customer Data with EOHHS

[4] The MassCARES database includes client data from certain EOHHS-jurisdictional agencies, including the Department of Transitional Assistance ("DTA") and the Division of Medial Assistance ("DMA"), which administer governmental programs that have income-eligibility criteria similar to that required by Utilities for low-income discount rate enrollment.

In Massachusetts, G.L. c. 214, § 1B (the "Right-of-Privacy Act") governs an individual's right to privacy. That statute reads:

> [a] person shall have a right against unreasonable, substantial or serious interference with his privacy.

G.L. c. 214, § 1B.

In general, the Right-of-Privacy Act protects individuals from disclosure of facts that are of a highly personal or intimate nature where there exists no legitimate, countervailing interest. Dasey v. Anderson, C.A.1 (Mass.), 2002, 304 F.3d 148. Moreover, the Right-of-Privacy Act is typically invoked to remedy the gathering and dissemination of information for which an individual contends is private. Id. Although the Right-of-Privacy Act has not been applied by the courts to determine if the sharing of a customer's data with a third party without authorization may violate its provisions, the Department's proposal may result in Right-of-Privacy claims if a Utility customer determines that the Utility's sharing of that customer's data with EOHHS causes the disclosure of information of a highly personal nature. Accordingly, consistent with Dasey, the Department must weigh the Utility customer's right to protect highly personal information with the Department's interest in identifying eligible customers for low-income discounts.

The most likely scenario in which disclosure of "highly personal" information might occur is if the Department's policy requires Utilities to share a customer's social security number with EOHHS for purposes of determining a "match." Currently, a customer that applies for NSTAR's low-income discount rate provides NSTAR with authorization to share his or her customer information with a governmental agency, e.g., DTA or DMA, to verify enrollment on a qualifying governmental program. In seeking

such verification, NSTAR has provided the agencies with limited information to identify a customer, including the customer's name, address, social security number. It is the Company's understanding that a customer's social security number is the most efficient means of properly matching a Utility customer with information held by EOHHS agencies. Presumably, this is also true in the context of matching customer data with client data in the MassCARES database.[5]

However, the customer's social security number is likely the most personal piece of individual information that, if released by NSTAR to EOHHS without explicit permission from the customer, may conceivably give rise to a claim by the customer under the Right-of-Privacy Act. Indeed, the federal Privacy Act of 1974 (the "Privacy Act") and federal precedent interpreting the Privacy Act recognize the highly personal nature of an individual's social security number and protects this information from public disclosure in many instances. See, e.g., Sherman v. U.S. Dept. of Army, C.A.5 (Tex) 2001, 244 F.3d 357, *rehearing denied*; Sheet Metal Workers Intern. Ass'n, Local Union No. 19 v. U.S. Dept. of Veterans Affairs, C.A.3 (Pa.) 1998, 135 F.3d 891. Accordingly, although sharing a customer's social security number with EOHHS may facilitate matching Utility customers' data with EOHHS client data, the Company believes that doing so without permission gives rise to potential privacy claims under the Right-of-Privacy Act, and thus, may cause potential harm to the Company's customers.[6]

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[5] Although a match may be made with only a customer's name and address, because certain names and addresses are common to many people in some instances, the risk increases that EOHHS may improperly identify a Utility customer as being enrolled on an EOHHS-administered program if only a name and address are used to perform a match.

[6] Although a court may ultimately determine that the release of customer data by a Utility to the EOHHS does not violate the Right-of-Privacy Act, such an outcome is, at best, unclear. Accordingly, the Department should place considerable weight on privacy concerns in fashioning a policy that requires Utilities to share customer data with third parties, particularly in this instance when the third party in question is a governmental agency.

b. The Massachusetts Public Records Law May Allow Customer Data to Be Available to the Public Without Customer Authorization.

In addition to Right-of-Privacy Act issues, the sharing of customer data with EOHHS may result in the release of customer data to the general public and thus, cause intrusions into the privacy of the Company's customers. To the extent that EOHHS receives customer data from NSTAR, or any other Utility, that information is subject to public disclosure pursuant to the Public Records Law, unless the information falls under a specific exception. G.L. c. 4, § 7 (clause 26). Although an exception from the definition of "public records" exists for "data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy" (see id., subsection (c)), it is unclear under current precedent whether an individual's name, address or other customer data fit within this exception to the Public Records Law.[7] Therefore, the Department's proposal may lead to the possible misuse of customer data by third parties outside of EOHHS that gain access to such data via a request for

[7] For example, in Massachusetts, the Registry of Motor Vehicles ("RMV") uses social security numbers in many instances as driver's license numbers, which, in turn, are considered to be public records under the Massachusetts Public Records Law. However, consistent with the federal Privacy Act, the RMV notifies applicants for driver's licenses at registry offices that they have the right to request that their license number not be the individual's social security number. See Doe v. Registrar of Motor Vehicles, 1993 WL 496590 (Mass.Super.), referencing 5 U.S.C. § 552a note (1982). Therefore, individuals are given the choice by the Massachusetts RMV whether to allow the possible release of their social security numbers via a Public Records Law request. Accordingly, Massachusetts law recognizes that, even for purposes promoting public safety, the release of an individual's social security numbers' may be particularly intrusive to those individuals that have not authorized such a release. Accordingly, the Company strongly recommends that the Department not require Utilities to include social security numbers in any electronic data provided to the EOHHS, or any other governmental agency, without explicit permission from a customer to do so.

information from EOHHS.[8]

This potential result would be inconsistent with the Department's past policies that have attempted to protect customer data from possible misuse. For example, in Competitive Initiatives, D.T.E. 01-54, the Department directed electric distribution companies to compile a list of customer data, including names, addresses, rate classes and other service-related data, and provide such lists to licensed competitive suppliers, for the purpose of facilitating customer migration to the competitive electricity market. See Competitive Initiatives, D.T.E. 01-54 (June 29, 2001); Competitive Initiatives, D.T.E. 01-54-A (Phase I) (October 15, 2001); Competitive Initiatives, D.T.E. 01-54-B (Phase II) (July 29, 2002). However, the Department required suppliers that received the customer lists to agree to protect such information from public disclosure. See Competitive Initiatives, D.T.E. 01-54, at 6 (June 29, 2001).

Accordingly, the Department's proposal to direct Utilities to provide "all" residential account information to the EOHHS, as opposed to residential account information that a customer has authorized the Company to share with EOHHS via their low-income discount application, raises important privacy issues that the Department should consider before requiring the Utilities to implement such a proposal. Such a proposal goes beyond previous Department directives requiring customer information to be released to third parties, because a proposal directing Utilities to share customer data with a governmental agency risks public disclosure of such information without the

[8] The Department's briefing question properly envisions that the EOHHS would destroy all non-matching data after performing the electronic match. However, although this would limit the window within which a third party may seek to have such information disclosed through a Public Records Law request, it does not sufficiently restrict the public's access to the information, particularly if essentially the same data is provided to the EOHHS periodically for purposes of performing an updated match.

explicit authority of a customer. Thus, NSTAR recommends that the Department should consider focusing any directive regarding the implementation of a computer matching program to customer data that has been explicitly authorized by a Utility's customers to be shared with EOHHS.

2. Privacy Issues Relating to EOHHS Verification of Client Status with the Utilities.

In addition to the privacy issues that arise in analyzing the sharing of customer data by Utilities with a governmental agency, privacy issues also exist in the context of EOHHS "matching" such data with the Utilities. As noted in prior comments, NSTAR currently has a system in place with the DTA to automatically renew customers in its low-income rates based on information provided to NSTAR by the customer or by the DTA's verification of a customer's previous participation in a DTA program. However, because of federal and state privacy statutes, the DTA has not provided information directly to NSTAR regarding new clients that have enrolled on a qualifying DTA program unless it had customer authorization to do so via NSTAR's low-income discount rate application. To date, the DTA has released new client information to an independent mailing house, which is then able to mail information on the availability of low-income rates to customers that match those on NSTAR's customer list. Accordingly, customers are directly informed of the existence of the low-income rates, while retaining the choice to disclose their personal data to NSTAR for the purpose of demonstrating eligibility.[9]

[9] This flow of client data from the governmental agency to the utility is similar to the customer data sharing program currently in effect in Texas, where a third-party administrator receives information provided to it by the Texas Department of Human Services ("TDHS") and the Electric Reliability Council of Texas and "matches" such data for the purpose of identifying electric utility customers that may be eligible for a utility discount rate.

The DTA's policy regarding the sharing of client data appears to stem, in part, from a Massachusetts law that prohibits the disclosure or use of information about persons applying for or receiving general public assistance, unless such disclosure is in accordance with the regulations of the DTA. G.L. c. 271, § 40. DTA's regulations explicitly protect the disclosure of personal data, in certain circumstances:

> [i]f the disclosure of personal data may constitute an unwarranted invasion of personal privacy, the personal data is not a public record. In general, disclosure of personal data may constitute an unwarranted invasion of privacy when: (A) [t]he personal data is not of common knowledge, not of public record, and not in public view; (B) [d]isclosure will more likely than not be embarrassing or offensive to the data subject; and (C) [t]here is no legitimate public interest in disclosure sufficient to outweigh the potentially embarrassing or offensive nature of the disclosure.

106 C.M.R. 104.080. In addition, the DTA's regulations state that disclosure to the public of client-record information is normally an unwarranted invasion of personal privacy. 106 CMR 104.110.[10] It is the Company's understanding that the DTA has interpreted these regulations restrictively.

It is also the Company's understanding that the DMA has similar restrictions on the sharing of its client information with third parties.[11] Accordingly, unless and until EOHHS has proper authorization from their clients to share their client status with the

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[10] These regulations are consistent with regulations promulgated by the federal Social Security Administration ("SSA"), which allow the SSA discretion to release client information, but limits such discretion to cases where the SSA determines that disclosure would not amount to a "clearly unwarranted invasion of personal privacy." 20 C.F.R. 401.140.

[11] The DMA's recent "Notice of Privacy Practices," effective April 14, 2003, states that the DMA cannot use or share a client's health information with anyone without that client's written permission unless: (1) the U.S. Department of Health and Human Services needs it to make sure that the client's privacy is protected; (2) required by law; (3) required for payment activities; (4) required to operate the DMA's programs; (5) necessary to share with the client's health-care providers to coordinate treatment and services; (6) necessary to share with health-oversight agencies; (7) for research projects that meet privacy requirements; (8) for purposes of providing information to other governmental agencies that give the client benefits; (9) for purposes of preventing or responding to an immediate and serious health or safety emergency; or (10) to notify the client about new benefits, services or health care choices.

Utilities, it appears that EOHHS would be unable to notify the Utilities that it has identified a Utility residential customer that is enrolled on an EOHHS-administered qualifying program that is not enrolled on the Utility's low-income discount rate. NSTAR supports the Department's efforts to work with DTA and DMA, among other agencies, to have such agencies agree to provide a "check-off" box or other means of authorization on their respective applications in order to allow clients to explicitly authorize such agencies to release their client status to a Utility for purposes of facilitating their enrollment onto a Utility discount rate. However, until the agencies have implemented these application changes and received proper authorization from their clients to share their client status with the Utilities, privacy issues will pose obstacles to the implementation of a computer-matching program of the scope envisioned by the Department in its Briefing Question.

B. The Department Should Provide an Explicit Mechanism for Utilities to Adjust Distribution Rates to the Extent that it Directs Utilities to Increase Enrollment on Their Respective Low-Income Discount Rates Through the Use of a Computer Matching Program

In addition to the privacy considerations outlined above, cost considerations also pose a legal impediment for Utility participation in a computer matching program of the scope envisioned in the Department's Briefing Question. As noted by the Company in its January 2002 Comments, the Act codified a long-standing Department policy regarding the costs of low-income discount rates, i.e., that they "shall be included in the rates charged to all other customers of a distribution company." G.L. c. 164, § 1F(4)(i). Consistent with this statutory provision, the Department has held that subsidized rates should be available for income-eligible customers, provided that the impact of the subsidy on other customers is reasonable. Cambridge Electric Light Company,

D.P.U. 92-250, at 250 (1993), Massachusetts Electric Company, D.P.U. 89-21, at 43-44 (1989); Western Massachusetts Electric Company, D.P.U. 87-260 (1988), Eastern Edison Company, D.P.U. 88-100, at 62 (1988). This policy is rooted in the fact that, whenever a customer is enrolled on a Utility discount rate, the discount is paid by other customers that are in a Utility's non-subsidized rates.

Accordingly, a cost analysis of the Department's computer matching proposal is important because the Utilities design rates using assumptions regarding the level of participation on a residential low-income discount rate. Although it is assumed that participation on low-income discount rates will fluctuate, and likely increase as a result of outreach efforts, the implementation of a computer matching program involving the entirety of a Utility's residential accounts may result in a significant increase in low-income discount rate penetration which, although desirable from a public policy standpoint, has direct impacts on the rates of a Utility's remaining customers that are not eligible for low-income discount rates. Because, to date, this proceeding has been generic in nature, the Department has not had an opportunity to analyze whether the subsidies provided by customers will be reasonable if a computer matching program is implemented to identify customers eligible for low-income discount rates.

Therefore, the Department must consider the potential rate impacts of directing the Utilities to implement a computer-matching program with EOHHS that involves the sharing of all residential customer data with the agency. In doing so, the Department should consider the appropriate balance between the costs and benefits of increasing the penetration rate for Utility low-income discount rates and provide for an appropriate mechanism to allow the Utilities to adjust rates for other customers.

III. CONCLUSION

As noted herein, several privacy issues are necessarily implicated if the Department directs the Utilities to implement a computer-matching program with EOHHS that includes data from all residential customer accounts. In addition, because the Utilities current rates are designed using certain historical assumptions regarding the level of participation on low-income discount programs, the Department should consider the cost impacts of implementing a computer matching program of the scope envisioned by the Department in its Briefing Question, in order to determine if the costs to customers associated with increasing penetration on the Utilities' low-income discount rates are reasonable. If the Department determines that such costs are reasonable, the Department should provide the Utilities with an explicit mechanism to adjust their residential rates accordingly.

The Company appreciates the opportunity to provide the Department with an analysis of legal issues implicated by the Department's Briefing Question.

Respectfully submitted,

NSTAR

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Date: July 7, 2003